

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.L. et al., Persons Coming Under the  
Juvenile Court Law.

B263177  
(Los Angeles County  
Super. Ct. No. DK09258)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BETTE L.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Terry T. Truong, Commissioner. Affirmed.

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

---

Bette L. (mother) appeals jurisdictional and dispositional orders by the dependency court declaring her sons E.L. and J.L. dependents and removing them from her care. We affirm.

### **BACKGROUND**

E.L. (age 16) and J.L. (age 15) came to the attention of the Department of Children and Family Services (DCFS) in December 2014 through a report that the boys were living with mother in a filthy, cluttered, cockroach-infested home, the boys were unsupervised, and mother had allowed a man to live in the home, exposing the boys to domestic violence (he had moved out but continued to visit).

The boys were well groomed, healthy, and appropriately dressed. A school counselor reported they were doing fine, attended regularly, and received A's and B's. The boys said they got along with mother's boyfriend, although he and mother fought before breaking up and getting back together. E.L. heard "yelling and things bumping around" and once saw the boyfriend come out of the bedroom bleeding, so he thought "mother can handle herself." No one hit the boys, called them names or yelled, or used drugs. The apartment was messy and dirty, as mother refused to clean or throw things away. She often went to Disneyland and left them home alone without enough to eat.

The maternal grandmother (MGM) stated the boys were not properly supervised, did not have enough to eat, and the home was filthy. Mother had a history of domestic violence, including by the boyfriend, and MGM had participated in an intervention to get him out of the house. Mother called MGM crying and asking for help, saying that the boyfriend shot a BB gun at her and shoved her (although mother often recanted her statements). J.L. told MGM that he was scared and cried when mother and the boyfriend argued one night.

A DCFS social worker found mother's two bedroom, one bathroom apartment unclean, with dust and dirt everywhere, cobwebs, and a smell of urine and rotting food. The hallways were full of obstructions, the carpet, table, and counters were covered with clutter, and trash bags and clothing were piled high, making it difficult to move about.

Dry waste was in the toilet and towels smelling of mildew and urine were on the bathroom floor. Roaches crawled on the ceiling, walls, furniture, and counters. In the kitchen, food rotted on plates in the sink, and roaches were in the freezer and refrigerator, which contained spoiled food and was covered with scum and dirt. Mother, who was appropriately dressed and well-groomed, was defensive and uncooperative and did not unlock her bedroom, saying the key was at work. She also said she had the leasing office spray twice for cockroaches. The leasing manager, however, said they sprayed monthly, but mother would not allow them to spray, and mother was often at Disneyland, leaving the boys unsupervised.

In a second visit as agreed with mother one week later, the apartment was in worse condition, the smell of rancid food and urine persisted, and the table was hidden by stacks of books and magazines. Mother's room was so full of piles of clothing, trinkets, old bottles and miscellany that the door would open only halfway and there was no space to walk. Mother explained that she had been moving things out of the closet and onto the bed and was too busy to return the social worker's calls. She agreed to a safety plan for the boys to stay elsewhere while she cleaned the home, and later notified the social worker that the boys were staying with MGM.

A week later on December 29 the social worker returned for the third arranged home assessment but mother was out and the social worker could not contact her. The social worker returned the next day while the leasing office was inspecting the apartment. When the door opened, roaches fell to the floor and ran out of the apartment, which was in even worse condition with spoiled juice and open bags of junk food in the living room. Mother had not been home in several days and there were fire hazards (Christmas lights left on and boxes blocking any safe exit). A notice for correction was on the door. Mother emailed, said she had the flu, and requested another visit.

The social worker interviewed the boys' father by telephone. He stated that he and mother used to fight and she had put a knife to his chest and tried to run him over with her car. After the divorce father had moved to Tennessee. Mother had full custody;

he paid child support but had no visitation, and mother would not let him see or talk to the boys. He planned to fly to California for the court date.

On January 20, 2015, DCFS placed the boys in MGM's care. A petition filed January 23, 2015, alleged under Welfare and Institutions Code section 300<sup>1</sup> subdivisions (a) and (b) that mother and her boyfriend engaged in violent altercations in the children's presence, he shot a BB gun at mother and pushed her, and he and mother engaged in a physical altercation while E.L. was present. Mother failed to protect and endangered E.L. and J.L. by allowing her boyfriend to live in the home. The petition also alleged under subdivision (a) that mother and father had a history of violent altercations in the boys' presence, including once when mother held a knife to father's chest, also endangering the boys. Under section 300 subdivision (b), the petition alleged that the children's home was unsanitary, cluttered, and hazardous, and the filthy environment endangered the children's health and safety, created a detrimental home environment, and placed the children at risk of physical harm. DCFS believed the boys were at a high risk of abuse given the history of domestic violence and the filthy home, which bred germs and bacteria making them more susceptible to illness, and according to the Center for Disease Control and Prevention (CDC), cockroach droppings triggered asthma attacks in children.

Mother and father testified at a detention hearing at which the court found a prima facie case for detaining E.L. and J.L., and released them to father on the condition they stay with MGM or maternal aunt for the rest of the school year. Mother was referred to individual counseling and parenting classes, with unmonitored visitation in a neutral setting on the condition that her boyfriend not be present.

Before the adjudication hearing, E.L. told the social worker that in 2014 he woke at 2:00 a.m. to hear mother fighting with her boyfriend and telling him to leave, and then he saw him walk from mother's room to the bathroom with blood on his forehead. Mother had told E.L. that her boyfriend had broken her car's outside driver's side door

---

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

handle and the inside front windshield. At one point mother told the boys to take her boyfriend's belongings outside and he left, but came back in a month or so. E.L. was sorry he hadn't told mother he did not approve of her boyfriend, "because his mother deserves to be treated better." E.L. also remembered mother crying and apologizing after she hit father with a meatloaf box and he bled from the neck. The house had been messy since 2012, and mother collected clothing she bought online. E.L. saw roaches beginning in September 2014. Mother and the apartment manager told him the roaches came from the apartment next door, and there was no appreciable difference after the house was fumigated in November 2014.

J.L. thought mother's boyfriend was cool; he spent the night a few times a week and J.L. heard arguing once or twice a month but did not worry that he might hurt mother. Once, mother told J.L. that her boyfriend had hit her, and when he refused to leave she called the sheriff. J.L. stood by mother until her boyfriend left. "I don't think my mom should be dating guys that hit her." J.L. tried to clean but everything would get dirty again. Mother shopped online, the clothes piled up, and mother liked to collect other things. J.L. had enough of having a dirty house when, in September 2014, he woke up on the couch with a cockroach on his arm. The apartment had been fumigated before the social worker visited. Asked how the condition of the apartment impacted him, J.L. said he had asthma "since birth" and knew it was bad to live in a dirty home. During his last asthma attack in 2014, J.L. used his inhaler and then called MGM feeling ill and unable to speak, and she took him to the emergency room. Mother had not refilled his nebulizer medication and he thought she used the money to shop.

Mother said she and her boyfriend "butt[ed] heads" when he lived with her for two months in 2013; he refused to leave, threw cookies at her, and pulled her hair. At his home he pushed her after an argument, held her against the door, and refused to let her leave; after she called the police he gave her the car keys. He also fired a BB gun into the air. She explained that once when she asked him to leave, he tripped and hit his head on her bedroom furniture, making it bleed, and E.L. woke up. She had gone to counseling to

understand why she was in “her second relationship where the man is verbally, physically, and emotionally abusive,” and her boyfriend joined her for three sessions. Father had been verbally and emotionally abusive, punching holes in the wall, overturning a heavy table, and throwing Coke cans at her; she pulled a knife to protect herself and left to live with MGM. Mother described the apartment as clean, although cluttered; she never left the boys home alone overnight. After she saw roaches in the fall of 2014, she had management spray in January and February 2015, and saw an improvement. She did not believe the apartment caused J.L.’s asthma, which was getting better, and denied he needed to go to the E.R.

Father denied physical violence but acknowledged pushing mother and fighting with her when she had a knife in her hand. The house was extremely messy and would have been unsafe if he had not cleaned. Father requested sole custody of the children to live with him and his family in Tennessee.

At the March 13, 2015 jurisdiction and disposition hearing, mother denied her home was ever filthy. Shown photographs of the apartment taken December 31, 2014, mother acknowledged on that day it was “cluttered and filthy and messy,” but explained she was in the process of cleaning and going through her things to decide what to donate or discard. After the cockroach problem began in the fall the landlord fumigated three times. In February she moved to a new place with no cockroaches that the social worker told her looked “very homey.” Her boyfriend had pushed her, thrown cookies at her, and called her names; she had pulled his hair and grabbed a crutch in self-defense. E.L. had seen blood on his forehead after he tripped. Mother broke up with the boyfriend in July 2013 and banned him from the home for three months, but now she allowed him to visit.

E.L. testified that he did not know how mother’s boyfriend got blood on his head, and explained that the clutter in the photographs was because they were cleaning for the social worker and the fumigation. Mother was gone overnight every other week, and except when she cooked on weekends, they ate frozen food. He saw roaches in fall 2014, including in the refrigerator, and they had tried to kill the roaches with insecticide.

Mother's counsel argued that at the time of the hearing mother had moved, was no longer in a relationship with her boyfriend, and was changing her life. Minors' counsel and DCFS argued the home conditions were terrible and the boys had to raise themselves while watching mother engage in a relationship characterized by domestic violence.

The court dismissed three counts and found true two counts under section 300, subdivision (b) as amended (amendments italicized). Count (b)(1) read: "On 12/30/14, and on prior occasions, the children[']s] home was found to be in a deplorable, unsanitary and hazardous condition. The home emitted a foul odor of urine and decayed food. The ceilings and furniture were dusty and covered in cobwebs. The floors in the home were impassable due to clutter, bags of trash, piles of clothing, boxes and other household items. The bathroom toilet contained dry waste. The bathroom floor contained wet, soiled towels that smelled of mildew and urine. The kitchen sink contained dishes covered in rotting food, and the inoperable refrigerator contained spoiled food. The home was infested with cockroaches on the ceilings, walls, furniture, kitchen counters and in the refrigerator. The mother's bedroom floor was impassible with trash and household items up against the walls. *The child [J.L.] suffers from asthma*, and such a filthy, unsanitary and hazardous home environment established *for the child [J.L.]* by the child's mother . . . *endangers the child [J.L.]'s physical health and places the child [J.L.] and his sibling, [E.L.], at risk of harm.*" Count (b)(2) read: "The children [E.L. and J.L.]'s mother . . . and mother's male companion . . . have a history of engaging in *physical and verbal* altercations, *some of which occurred while the children were in the home. The altercations included the male companion pushing and hitting the mother.* On a prior occasion, the male companion shot a BB gun *while arguing with the mother.* The mother failed to protect the children in that the mother allowed the male companion to reside *and visit* in the children's home and have access to the children. Such *physical and verbal altercations on the part of the mother's male companion against the mother*, and the mother's failure to protect the children, endanger the children's physical health and safety and place the children at risk of harm." Mother's counsel objected to the

amendments as a denial of due process, and the court responded: “[M]y only phrase that I added in is ‘the child [J.L.] suffers from asthma,’ and your client already knew this.” The court continued: “I did not find [mother] to be credible at all. I really did not. This home cannot be in this condition because she and the children were trying to clean the home. And that is not what her sons are telling me. Her sons are telling me that the condition of this home has been this way for quite some time. Food does not become mildew[ed, f]ood does not become rotten in one day, the day that she’s cleaning. It doesn’t get that way. [¶] I truly believe [mother] has serious issues going on. The fact that one of her sons is saying that he ran out of his nebulizer medication, and he thinks it is because his mother did not have the money to refill the prescription because she buys things is troubling to this court. Very troubling. [¶] . . . [The boys] basically raised themselves . . . at least for the last two years. And it’s unfortunate that they had to be put into the position to do so. [¶] I don’t believe [mother] is no longer with [her boyfriend]. There is no indication that she separated from him. I don’t believe the counseling, the so-called four sessions that she attended where he also participated helped their relationship any. [¶] It’s sad to hear her children say they should have told her something about him. It just shows this court that she had no clue whatsoever what was going on with her children.”

Before disposition, the court admitted a letter from mother’s therapist that mother was attentive and receptive to therapy focused on parenting skills, domestic violence, and keeping a clean and organized home. Mother’s counsel argued that the boys should be returned to mother in her new place with unannounced home calls, as the boys were “wonderful young men also because of everything the mother has done with these children,” and although the house was dirty, clear and convincing evidence did not support removal. The court ordered the boys removed and placed with father, with the current visitation order for mother.

Mother filed this timely appeal.



## DISCUSSION

Mother does not challenge the trial court's finding of jurisdiction, but claims the amendment of the petition violated her due process rights and the removal of E.L. and J.L. from her custody was not supported by clear and convincing evidence.

Mother argues that her due process rights were violated when the trial court, without notice, amended the petition at the jurisdiction/disposition hearing to include the specific allegation that J.L. "suffers from asthma and such a filthy, unsanitary and hazardous home environment . . . endangers [his] physical health." She claims that if she had adequate notice that the petition would contain a specific allegation regarding asthma, she could have presented evidence that J.L.'s asthma originated at birth and had improved rather than worsened. "[S]ection 348 provides that provisions in the Code of Civil Procedure relating to variance and amendment of pleadings in civil actions apply to juvenile dependency petitions and proceedings. Amendments to conform to proof are permitted, but material amendments that mislead a party to its prejudice are not allowed. (Code Civ. Proc., §§ 469–470.)" (*In re Andrew L.* (2011) 192 Cal.App.4th 683, 688–689.) A petition cannot be amended to conform to proof if the variance between pleading and proof "is so wide that it would, in effect, violate due process to allow the amendment." (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041–1042.) We review the court's amendment for an abuse of discretion. (*Id.* at p. 1043.)

The original allegation alleged that the unsanitary apartment endangered the boys' physical health and safety. The petition also included a reference to CDC findings that cockroach droppings exacerbate childhood asthma. J.L. stated that he had asthma since birth, and he had a severe attack in 2014 requiring him to call MGM to take him to the emergency room. Both boys stated that the cockroach infestation began in September 2014. The record also contains mother's assertion that J.L.'s asthma was improving, he did not need to go to the emergency room, and she did not think the filthy apartment contributed to his asthma. She was on notice that J.L.'s asthma was an issue and that the conditions in her home threatened his physical health. Even if his severe asthma attack in

2014 occurred before the cockroach infestation in the fall, the presence of cockroach droppings would put J.L. in further danger of more severe attacks. A petition may be amended to conform to proof, and the amendments in this case did not introduce a significantly different theory of dependency. An amendment specifically mentioning J.L.'s asthma did not mislead mother to her prejudice and the trial court did not abuse its discretion in amending the petition.

As to the removal order, at the dispositional hearing a minor may not be removed from the custody of a parent with whom he or she resided at the time of the petition unless the court finds by clear and convincing evidence that there is a substantial danger to the minor's physical health, safety, protection, or physical or emotional well-being if returned home, and there is no reasonable means by which the minor can be protected without removal. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) An order removing a child from parental custody "is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136.) We review the trial court's ruling for sufficiency of the evidence. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880–881, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748–749, fn. 6.) "[O]n appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.'" (*In re J. I.* (2003) 108 Cal.App.4th 903, 911.)

Mother cites *In re Jeannette S.* (1979) 94 Cal.App.3d 52, which found insufficient evidence to support removing the child from the mother's filthy home and placing her in the custody of DCFS because the court failed to consider less drastic alternatives, including releasing the child to the mother with "stringent supervision" and placing the child with her father rather than in foster care. (*Id.* at pp. 59–61.) Mother argues that the court could have returned the boys to her with unannounced home visits, as she had

shown improvement by moving to a different address. This ignores the evidence that each time the social worker returned to mother's apartment (and mother was aware of the planned visits) it was filthier, and mother denied that there was a problem and insisted DCFS was lying. The only evidence that her new apartment was cleaner was mother's testimony about what a social worker said to her. (Compare *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 [abuse of discretion to deny section 388 petition when the uncontradicted evidence was that the home was no longer dirty].) The trial court found mother not credible "at all," and was entitled to disbelieve her testimony, including her statement that she had separated from her boyfriend and only allowed him to visit. The court was also entitled to believe J.L.'s testimony about the severity of his asthma and his need to call his grandmother to take him to the emergency room over mother's assertion that it was not a problem, and was also entitled to be troubled by her failure to refill his nebulizer prescription. As to the reasonable alternative of placing the boys with their father, the court not only considered but chose this alternative. While "chronic messiness by itself and apart from any unsanitary conditions or resulting illness or accident, is just not *clear and convincing* evidence of a substantial risk of harm," (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1005), here there was evidence not of mere messiness but of unsanitary and hazardous conditions and resulting illness, as well as an abusive boyfriend who was not excluded from the home. Considering as we must the evidence in favor of the judgment, substantial evidence supported the removal order placing the boys with father.

**DISPOSITION**

The orders are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.